No. 16504

United States
Court of Appeals
For the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, co-partners, doing business as Riddle General Store, Bankrupts,

Appellant,

vs.

CLIFFORD E. DICKIE, and MARIE E. DICKIE,

Appellees.

Brief of Appellees

Appeal from the United States District Court for the District of Oregon.

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WATSON PRINTING COMPANY - PORTLAND, OREGON

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STATEMENT OF JURISDICTION

This suit arises under Section 60 (b) of the Bankruptcy Act and was brought in the United States District Court for the District of Oregon. Judgment was entered for appellees.

Jurisdiction of this court is based upon Title 11 U.S. C.A., Sec. 47.

STATEMENT OF THE CASE

This appeal involves a preference suit commenced under the provisions of Section 60 (11 U.S.C.A., Sec. 96), of the Acts of Congress relating to bankruptcy.

Appellees for many years prior to April 11, 1955, owned and operated the "Riddle General Store," at Riddle, Oregon, in which they were engaged in the retail sale of general merchandise.

On April 11, 1955, they executed with the bankrupts a contract, under the terms of which appellees agreed to sell and bankrupts agreed to buy all of the assets, including the fixtures and inventory of the Riddle General Store, for the sum of $30,000.00, which sum was to be paid $8000.00 at about the time of the execution of the contract, and the balance of $22,-000.00 would be paid in monthly installments of 5% of the gross income from the operation of the business, with a minimum of $300.00 in any one month.

In June, 1957, the bankrupts were in default under the terms of said contract, and appellees commenced a suit in the Circuit Court of the State of Oregon for the County of Douglas, to declare appellees the absolute owners of the property sold under said contract, and praying for a decree restoring to them all of the stock of merchandise, inventory and fixtures then located in the Riddle General Store, as well as the premises. A decree was duly entered by said Circuit Court on July 1, 1957, which included the following:

> "1. That plaintiffs are the sole owners of the furniture, fixtures and stock of merchandise located at the Riddle General Store free and clear of all liens, claims, rights, title and interest of the defendants, or either of them, and all persons claiming by, through or under them, with the exception of a certain stock of merchandise on consignment from the Ferry-Morse Seed Company and excepting also a hose rack which shall remain the property of defendants; and excepting a security claim of Commercial Credit Corporation in certain appliances now located in said store.
>
> 2. That plaintiffs are entitled to the immediate possession of the furniture, fixtures and stock of merchandise above described, subject to the above named exceptions, and the defendants are required to deliver the possession thereof to plaintiffs."

On July 1, 1957, appellees took possession and control of said store, and all of the furniture, fixtures and stock of merchandise, which inventory of merchandise

at said time, in accordance with a physical taking thereof, was of the value of $14,786.17. Thereafter, on July 11, 1957, the purchasers herein were duly adjudicated bankrupts in the United States District Court for the District of Oregon. Appellant is Trustee of the estate of said bankrupts.

SUMMARY OF ARGUMENT

Conditional sales of property are valid and do not require filing or recording under the Oregon law. Where the conditional sellers, in compliance with the contract, retook possession of their property prior to the time the conditional purchasers were declared bankrupts, and prior to election of trustee in bankruptcy, no preference was created.

Where state court adjudicated that conditional sellers are the sole owners of all the property, which adjudication was prior to time that conditional purchasers were declared bankrupt, and no proceedings were instituted to set aside the state court judgment, the same was res judicata and binding upon all persons, including appellant.

ANSWER TO SPECIFICATION OF ERROR NO. I.

The Validity of the Conditional Sales Contract Must be Determined by the Law of Oregon.

Other than a conditional sales contract relative to

personal property attached to real estate, **ORS 76.010,** there are no statutory requirements in Oregon for the recording or filing of conditional sales contracts. **Meier & Frank Co. v. Sabin,** 214 F. 231; **Maxson v. Ashland Iron Works,** 85 Or. 345, 166 P. 37.

Conditional sales contracts are valid under the law of Oregon. **Miles v. Sabin,** 90 Or. 129, 175 P. 863.

And, as stated in **Wickwire v. Hanson,** 133 Or. at page 88:

> ". . . It is the law of this state, that parties to a contract may agree upon its terms and in cases of conditional sales the courts will enforce the contract as agreed upon between the parties. . ."

The principal distinction between a conditional sale and a chattel mortgage must be borne in mind. Under a conditional sale the parties contemplate a sale of property with title remaining in the vendor until payment of the purchase price, the use and possession of the property being in the vendee with the further right on his part to acquire title upon performance of the terms and conditions of the contract.

In a chattel mortgage, the entire transaction is merely security for a debt, title and the right to the use and possession of the property remaining in the mortgagor, the mortgagee obtaining merely a lien upon the property as security. In Oregon, upon default, the mortgagee acquires a qualified title to the property.

Templeton v. Lloyd, 59 Or. 52, 115 P. 1068; **Commercial Securities v. Mast,** 145 Or. 394, 28 P. 2d 635.

Where property is sold under the condition that title is to remain in the vendor until payment of the price, possession and use being in the vendee, the vendor having the option upon default to repossess the property, the transaction is a conditional sales contract. **Lynch v. Sable-Oberteuffer-Peterson,** 122 Or. 597, 260 P. 222, 55 A.L.R. 180; **Francis v. Bohart,** 76 Or. 1, 147 P. 755; **Washburn v. Inter-Mountain Mining Co., et al,** 56 Or. 578, 109 P. 582; **McDaniel v. Chiarmonte,** 61 Or. 403, 122 P. 33.

In the instant case, the provisions of the contract on default gave appellees three options. They exercised their right to institute suit to take possession and to carry on the business. The state court adjudged appellees were the owners of the property and awarded possession.

Where a conditional vendor is entitled to repossess the property and does so before the institution of bankruptcy proceedings by the conditional purchaser, the conditional vendor will prevail as against a trustee in bankruptcy claiming a voidable preference. **Finance & Guaranty Co. v. Oppenheimer,** 276 U.S. 10, 72 L. ed. 443, 48 S. Ct. 209; **Jennings v. Schwartz,** 86 Wash. 202, 149 P. 947; **Hart v. Emmerson-Brantingham Co.,**

203 F. 60, 30 Am. Bank. Rep. 218; **Re Johnson,** 282 F. 273, 49 Am. Bank. Rep. 118.

Volume 3, Collier on Bankrupcy, 14th Edition, Par. 60.43, p. 942, Note 21:

"Wherever recording is not required to make the conditional sale good against a subsequent lien creditor of the vendee, the ensuing discussion as to perfection of transfer is not material. By the weight of authority the conditional vendor will prevail over a subsequent lien creditor of the vendee where recording has not been made a requisite. 1 Williston on Sales (2d ed. 1924) Sec. 324, 325; In re Lutz (D.C. Ark.) 28 Am. B.R. 649, 197 F. 492. Thus, so far as Section 60a is concerned, the preferential character of a conditional sale in such a case must be determined as of the date of execution of the transaction. This would seem to be true even where the contract gives the vendee the right of resale (see Bryant v. Swofford Bros. Dry Goods Co., infra, n. 21a). **Since the state law has not enunciated any policy that requires public notice of these transactions, the application of Section 60a can do no more. State statutes, however, should always be consulted for the latest legislative enactments."** (Emphasis added).

Appellant relies on **Davis v. Wood,** 200 Or. 602, 268 P. 2d 371, (App. Brief, p. 10) for the proposition that a conditional sales contract is not to be interpreted so as to allow the seller to claim it provides security on after acquired property. The only issue in that case was the question of whether the seller had wrongfully declared

a forfeiture of property being purchased under a conditional sales contract. The court concluded that the evidence was insufficient to show either an intentional abandonment of the property by the purchaser or any legally effective act of the sellers operating as a forfeiture of the property. There was involved not only a conditional sales contract but also a lease of real property. The court held that the additional property purchased and installed by the buyer became security for any sum which may be found to be due to the seller, but that it did not become the property of the seller when it was first purchased and installed.

It must be borne in mind that the court in the above cited case was sitting in equity to pass on the question of whether the seller had wrongfully declared a forfeiture. In order to do equity, the court, by obiter dictum, utilized a principle applicable to chattel mortgages. We have pointed out the particular differences between the legal effect of a conditional sales contract under which legal title is retained by the seller, as against a chattel mortgage, in which legal title rests with the mortgagor.

Appellant discounts the fact that the Oregon court in the instant case, entered a decree that appellees were the owners of all the property. This is not a case where declaratory relief is being requested as to the rights of parties, in futuro. When appellees were de-

clared by the Oregon court to be the owners, that became an accomplished fact, and the trustee is bound by such adjudication. (See Argument and authorities submitted herein in Answer to Specification of Error No. II.)

It should also be noted that in the **Davis v. Wood** case, cited by appellant, the conditional sales contract related to certain restaurant equipment and fixtures, and under the contract purchasers were required to purchase and install additional fixtures of approximately $2500.00, and the contract provided that "such additional personal property and fixtures shall be deemed and considered as a part of the seller's property which they are hereby selling under the contract to the buyer, etc." Unlike the contract in the instant matter, there is no sale of inventory involved, and no authorization of resale by the purchasers, and neither is there any specific provision in the contract for replacement of the merchandise that is sold by the purchasers. In the case at bar, the contract, inter alia, provided:

> ". . . (pages 2-3) It is agreed by and between the parties hereto that the value of the fixtures included in the above purchase price is the sum of $2,000.00 and that the value of the inventory of merchandise is the sum of $28,000.00 as of the 15th day of April, 1955.
>
> Purchasers agree that they will at all times keep up the inventory of said business to the full sum of $22,000.00, and will at all times keep said stock

of merchandise insured against loss by fire, damage by smoke or water, in the sum of $22,000.00. All policies of insurance to be so written as to set forth the interest of the Sellers and the Purchasers.

Notwithstanding the fact that the Purchasers shall have the right to sell merchandise from the stock on hand and continue to operate said business in a regular and general manner, the title to said fixtures and inventory shall in the event of default, as well as at all times herein mentioned, shall remain in the Sellers until the full balance of purchase price and interest as herein provided has been fully paid.

Purchasers agree that they will pay for all merchandise delivered to said business as the same is received to the end that all such merchandise shall become a part and parcel of the stock and inventory and the title immediately vested in the Sellers, subject only to right of the Purchasers as in this contract provided."

* * * *

(Page 6) "Notwithstanding anything to the contrary herein contained or any of the other obligations or rights of the parties hereto, Purchasers agree that they will, at least once each year, furnish to Sellers the complete inventory of the stock and merchandise then on hand. In the event said inventory shows that Purchasers are not maintaining the full amount of merchandise and stock as in this contract provided, then the Purchasers will forthwith increase the stock of merchandise to comply with the terms of this contract." (Emphasis added).

The foregoing excerpt from the contract specifically

provides that title to all after acquired property shall immediately vest in the sellers, and no such provision can be found in the case of **Davis v. Wood,** cited by appellant.

Kliks v. Courtemanche, 150 Or. 332, 43 P. 2d 913; **Caldwell Finance Co. v. McAllister,** 226 F2d 189, which approved the Kliks case, and **Hughbanks v. Gourley,** 12 Wash. 2d 44, 120 P. 2d 523, cited by appellant, but are not applicable to the facts in the instant matter. These cases involve money lenders who were attempting to secure themselves with a conditional sales contract in lieu of a chattel mortgage involving personal property which the conditional vendee never owned, and in which there was no provision for resale or agreement to replace or replenish any of the property.

Appellant contends that the conditional sales contract involved in the instant case should be construed to be comparable to an unrecorded chattel mortgage, and was not valid as against the trustee, and, further, that the conditional sales contract, lacking an acknowledgment, its recording was legally ineffective.

The recording of the conditional sales contract is immaterial to the issue in this case. The rights of the trustee (appellant) did not arise until after the adjudication of bankruptcy of the conditional purchasers. At that time, the property in question had already been adjudicated by the state court to belong to appellees.

When appellees repossessed themselves of their property they did what they had a lawful right to do as against the conditional purchasers and appellees simply took what was adjudicated belonged to them. At that time, no creditor had a judgment or other lien so far as the law of Oregon was concerned. **Finance & Guaranty Co. v. Oppenheimer,** supra.

And, as clearly stated, in **Jennings v. Swartz,** 86 Wash. 202, 149 P. 947.

> " . . . This court has many times held that, where contracts of this kind are void as between the vendor and creditors of the vendee, yet as between the vendor and the vendee such contracts are valid. . . And so in this case the conditional sales contract was clearly valid as between the original vendor and vendee; and when the vendor, in compliance with that contract, retook possession of the property prior to the time when any creditor obtained a specific lien thereon, and prior to the time the vendee was declared bankrupt, and prior to the time of the election of the trustee in bankruptcy, the vendor thereupon regained whatever interest he had in the property . . ."

In the above case, despite the fact that the conditional sale contract was void because not signed by the vendor, as the statute required, nonetheless, it was not necessary to pass upon the validity of the contract, as affected by creditors of the vendee, because the conditional sales contract was rescinded and possession

of the property was retaken by the vendor **before** any **right** or lien of creditors attached.

In the instant case, the conditional sale contract did not involve a loan of money by appellees to the conditional buyers. By the terms of the contract appellees made a bona-fide sale on credit, reserving title in themselves until the purchase price was fully paid. Hence, appellant's contention that it should be construed in the same light as that of a chattel mortgage, is untenable.

ANSWER TO SPECIFICATION OF ERROR NO II.

The decree of the state court is final as to ownership of the property and was rendered before adjudication in bankruptcy. The court had jurisdiction of the parties and competent power to render the decree.

If appellant desired to avoid the effect of and not be bound by that decree, it was his duty to apply to the Oregon court within one year from the entry of the decree to have it vacated to permit him to interpose a defense, if any. Not having made such application, the decree is final and conclusive.

The decree of the state court is res judicata and binding upon all persons, including appellant.

ARGUMENT

Prior to any bankruptcy proceedings, and on July 1, 1957, the Circuit Court of the State of Oregon for Douglas County, adjudged appellees to be the owners and restored to them all their right, title and interest in and to all the property now claimed by appellant. Such a decree was final and conclusive as to the title to the property.

The decree of the Circuit Court cannot now be collaterally attacked in this proceeding, except on the grounds of fraud, which has not been claimed or alleged by appellant. Such a decree must be given full faith and credit by the federal court in connection with all matters merged in said decree, which included a clear determination that appellees are entitled as absolute owners to all of the stock of merchandise, furniture and fixtures located in the Riddle General Store on July 1, 1957.

28 U.S.C.A., Sec. 1738.

"A judgment entered in a state court must be accorded full faith and credit in Federal District Court." **c. f. Treinies v. Sunshine Mining Co.,** 308 U.S. 66, 60 S. Ct. 44, 84 L. ed. 85, aff. 99 F. 2d 651 (9th); **American Surety Co. v. Baldwin,** 287 U.S. 156, 77 L. ed. 231, 53 S. Ct. 98.

The Circuit Court of Oregon having found that appellees are the absolute owners of all of the personal

property, including the inventory of merchandise located in the bankrupts' premises on July 1, 1957, any matters concerning whether the merchandise repossessed by the appellees was included in the stock of merchandise at the time of the execution of the conditional sales contract in April, 1955, or whether such merchandise was subsequently acquired by the bankrupts in replacement thereof, may not now be examined by another court.

> **ORS 43.130.** JUDICIAL ORDERS THAT ARE CONCLUSIVE. The effect of a judgment, decree or final order in an action, suit or proceeding before a court or judge of this state or of the United States, having jurisdiction is as follows:
>
> (1) In case of a judgment, decree or order against a specific thing or in respect to the probate of a will or the administration of the estate of a deceased person or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.
>
> (2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.

In **Harju v. Cox,** et al, 146 Or. 187, 29 P2d 364, it was held, that a decree declaring a decedent was the

legal owner of money paid to Administratrix of decedent's estate from proceeds of a judgment, was conclusive as to title to fund in County Court. The Court said:

> " . . . The moment the estate received Harju's money it became indebted to him in the sum of $1,000.00. It will be recalled that the circuit court, by its decree of January 5, 1929, 'ordered and decreed that the said defendant N. E. Harju is and hereby is decreed to be the legal owner and entitled to the said money, namely, the sum of $1,180.00,' and ordered its return to him . . .
>
> . . . In the instant case, the controversy between the administratrix and the claimant was settled in a suit instituted by her in a decree of the circuit court entered before the final report was filed . . .
>
> . . . After the entry of the circuit court's decree, it became the duty of the county court not to ignore nor to thwart the decree, but to carry it into effect so far as the writs, orders and other instrumentalities under its command permitted. The decree, by virtue of section 9-618 Oregon Code 1930, was conclusive in the county court as to the title of the fund. . . "

An authority apposite to the instant case is **Mercury Engineering,** 68 F. Supp. 376 (1946), where it was held, that an unappealed judgment rendered on stipulation and prior to adjudication of bankruptcy, in an action to foreclose a purchase price chattel mortgage covering machinery and equipment was res judicata between mortgagor and mortgagee, and was not subject to

relitigation by the mortgagor's bankruptcy trustee on behalf of creditors.

To the same effect is, **In re Coxes,** 105 F. Supp. 651, (1952), where a judgment of a state court in favor of a mortgagee in an action against the mortgagor and insurer to recover proceeds of a fire insurance policy, became final and no appeal was taken, the judgment was res judicata in bankruptcy proceedings wherein trustee sought proceeds of the fire insurance policy.

And in **Covey v. American Distilling Co.,** 132 F. 2d 453 (1943) (7), an order dismissing a judgment creditor's suit against a judgment debtor and distilling company to recover an amount paid by the debtor to the company on a contract of sale of whiskey, on the ground the contract was void., because debtor was not licensed to purchase the whiskey, was a 'final order' on the merits and was res judicata on the issue of the validity of the contract. The debtor's trustee in bankrupcy was denied the right to relitigate the validity of the contract.

In **Scott Publishing Co. v. Rodgers,** 229 F. 2d 956 (9th) (1956), this Court affirmed the principle of res judicata of a state court's determination that the trustee was entitled to the sum in controversy.

In **Stark v. Baltimore Soda Fountain Mfg. Co.,** 101 F. Supp. 842 (1952), it appeared that a replevin action

was brought in state court and judgment of restitution given for property involved. The replevin action was pending when the defendant was adjudged a bankrupt.

It was held that the judgment in the state court was res judicata in an action involving same property, and brought by trustee in bankruptcy claiming a preference, and even though trustee did not intervene in the replevin action. The court said, "The Trustee in this case having succeeded to the situation of the bankrupt is bound by the adverse state judgment."

Another authority directly in point with this case at bar is **Clark v. Mutual Lumber Co.,** 206 F 2d 643. The subject matter involved real estate. Dix and his wife owned the property and Dix was an officer of the Riverview Building & Supply Co., a corporation. He caused a building to be constructed on his property which was used by the Riverview Company. The corporation became financially involved and appellee was given a mortgage by Dix and his wife in the amount of the debt owing by the corporation. On January 4, 1951, a foreclosure suit was filed by appellee in state court, and a decree pro confesso was entered against all defendants. On January 31, 1951, an involuntary petition in bankruptcy was filed against Riverview, and it was adjudicated a bankrupt. There was no attempt by the bankrupt's trustee to intervene in the state proceedings,

and on February 21, 1951, the State Court entered its final decree of foreclosure.

The trustee claims the funds of the bankrupt were used in the purchase of the property and that the building which was thereafter constructed thereon was in possession of the bankrupt and was paid for in part with bankrupt's funds. That the mortgage given by Dix and his wife constituted a preference, etc.

A summary judgment was entered against the trustee. The court relied on **Eyster v. Gaff,** 91 U.S. 521, 23 L. ed. 403, where the principle of res judicata was applied. The court said:

> " . . . It is clear that, upon his election as trustee in bankruptcy, appellant herein became vested with title only to such property as belonged to the bankrupt at the time of the commencement of the proceedings, and has no right to have set aside the transfer of the property, such as here involved, **which did not according to the decree of the state court belong to the bankrupt. . . .**
>
> We conclude . . . that the judgment rendered in the state court had the effect of estopping the bankrupt and its trustee from asserting or maintaining any matter that might have been offered in that suit to defeat the claim asserted by the plaintiff therein, the present appellee . . ."

The District Court relied on the above cited case in its opinion rendering judgment in favor of appellees, and even though the state court judgment relied upon

therein was entered after bankruptcy—a situation more favorable to the appellant herein—the appellant in his brief at page 29 attempts to overcome the holding by stating, "It is submitted that the court in the Clark case nevertheless erred in its conclusion upon the facts of that case."

Avoiding Effect of Judgment of State Court.

If appellant desired to avoid the effect of and not be bound by the decree of the state court entered on July 1, 1957, it was his duty and he was empowered to apply to the Oregon court within one year thereafter, to have the decree vacated to permit him to interpose a defense, if any.

> **ORS 18.160.** Relief from judgment, decree, order or other proceeding. The court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, decree, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.

Pursuant to the provisions of **Section 29(e)** of the **Bankruptcy Act. 11 USCA 29,** a trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute **proceedings** on behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition of bank-

rupcy. Here, if the appellant contended that the after acquired property adjudicated by the state court was not owned by appellees, he had legal status to attack the judgment of the state court. **Nuckolls v. Bank of California, National Assn.,** 10 Cal. 2d, 266, 74 P. 264; **Garrison v. Seckendorf,** 79 N.J. Law, 203, 14 A. 311, 78 A. 1134, 80 N.J. Law 463; **Weil v. Simmons,** 66 Mo. 617; **Sproul v. Gambone,** 34 F. Supp. 441, 48 Am. Bank. Rep. (N..S) 286.

Appellant's failure to institute proceedings to vacate and set aside the state court decree, as he had a right to do, renders that decree conclusive and final, and he is absolutely precluded from now attacking the same. **c.f. Long & Alistatter Co. v. Willis,** 193 N.E. 774, 48 Ohio App. 366; **In re Edwards' Will,** 94 NYS 2d 810.

ANSWER TO SPECIFICATIONS OF ERROR NOS. III, IV AND V.

In a Preference Suit, the Burden of Proof of All the Elements of a Voidable Preference Rests Upon the Trustee.

> "Just as the trustee in his suit to recover property preferentially transferred must include allegations, in his statement of claim, of all the elements of the alleged voidable preference, so also must the trustee introduce evidence at the trial to sustain all such averments that have not been admitted. The law places upon the trustee (or receiver) the unmistakable burden of proving by a fair pre-

ponderance of all the evidence every essential, controverted element resulting in the composite voidable preference. A presumption arises that payments made by the bankrupt to creditors are valid, and the trustee seeking to recover such payments must overcome this presumption by adequate proof of a voidable preference. Where inferences from proved facts are to be drawn, the rule obtains that if two inferences of substantially equal weight may reasonably be drawn from the proved facts, then that inference shall prevail which sustains the transfer. As indicated previously, in the usual rules of evidence prevailing in the forum will be applied . . ." **Collier on Bankruptcy, 14th Ed. Vol. 3, Sec. 60.62, p. 1043.**

From the foregoing authority it is clear that all of the several elements included in the definition of a preference, as found in Section 60 of the Bankruptcy Act, must be proven by the trustee in order to prevail in a preference suit, **and that the burden of proof is upon the trustee in such suit in the proof of each of the elements.**

In the instant case the vital element is that the alleged transfer (the repossession by the defendants of the merchandise pursuant to the Circuit Court decree on July 1, 1957), was a diminution or depletion of the assets of the bankrupts. Thus, in addition to the matters heretofore discussed, it would be necessary for the appellant to have established by a preponderance of the evidence that the inventory of merchandise re-

covered by the appellees was substantially different than the inventory of merchandise which was in the premises at the time the bankrupts took over in April, 1955.

The evidence is uncontradicted that on April 15, 1955, the value of the stock of merchandise was $28,-000.00, and on July 1, 1957, pursuant to the physical inventory taken, it appears the value of the merchandise was $14,786.17. It is, therefore, clear that there being no excess in the value of the merchandise repossessed over the amount originally left upon the premises, that there cannot be any presumption that such merchandise as was repossessed was all after acquired merchandise. The situation would be far different if the amount repossessed by the defendants was in excess of $28,000.00 rather than being fifty percent of the original value, which was the situation.

In order for appellant to prevail in his contention, the court would be compelled to infer from the testimony as to the sales and purchases during the period of two years and three months of the possession of the bankrupts, that substantially all of the original stock of merchandise had been consumed or sold, and that there remained only the after acquired merchandise. There can be no such inference from such testimony, in light of the State Court decree, and the testimony of the appellees who took the inventory on

July 1, 1957, to the effect that substantial amounts of the original merchandise remained on the premises on that date. As a matter of fact, the District Court found that "at the time defendants took possession there was approximately 50% remaining which was the original stock of merchandise purchased by bankrupts from defendants." (TR. 21).

Furthermore, it is a common phenomenon of merchandising that the merchandise most recently acquired is sold more readily as it is new and fresh. The doctrine which prevails under federal tax statute "last in, first out" should be invoked in this instance to establish that where the inventory repossessed is fifty percent of the inventory originally left with the bankrupts, that the repossessed inventory was substantially that which was originally left with the bankrupts and not after acquired merchandise.

CONCLUSION

For the foregoing reasons, appellees respectfully submit, the judgment of the lower court should be affirmed.

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